



Habitat Conservation Plans

Section 10 of the Endangered Species Act

What is a Habitat Conservation Plan and Incidental Take Permit?

An incidental take permit is required when non-Federal activities will result in “take” of threatened or endangered species. A habitat conservation plan (HCP) must accompany an application for an incidental take permit. The purpose of the habitat conservation planning process associated with the permit is to ensure there is adequate minimizing and mitigating of the effects of the authorized incidental take. The purpose of the incidental take permit is to authorize the incidental take of a listed species, not to authorize the activities that result in take.

What is take?

“Take” is defined in the Endangered Species Act (ESA) as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered species. Harm may include significant habitat modification where it actually kills or injures a listed species through impairment of essential behavior (e.g., nesting or reproduction).

How many HCPs have been developed and what size areas do they cover?

Both the number of HCPs and the size and complexity of the areas they cover have increased. More than 430 HCPs have been approved, with many more in the planning stage. Most of the earlier HCPs approved were for planning areas of less than 1,000 acres; now 10 exceed 500,000 acres, with several larger than 1,000,000 acres. In some cases, there are more than one incidental take permit associated with a HCP. For example, the Central Coastal Orange County HCP was developed as an overall plan under which each individual participating entity received a separate incidental take permit. This suggests that HCPs are evolving from a process adopted primarily to address single projects to broad-based, landscape-level planning, utilized to achieve long-term biological and regulatory goals.



The Wisconsin Statewide HCP was developed for the conservation of the endangered Karner blue butterfly. Photo by Joel Trick.

Who needs an incidental take permit?

Anyone who believes that their otherwise-lawful activities will result in the “incidental take” of a listed species needs a permit. The U.S. Fish and Wildlife Service (FWS) can help you determine whether your proposed project or action is likely to result in “take” and whether a HCP is an option to consider. FWS personnel can also provide technical assistance to help you design your project so as to avoid take. For example, the project could be designed with seasonal restrictions on construction to minimize disturbance during nesting.

What is the benefit of an incidental take permit and Habitat Conservation Plan to a private landowner?

The permit allows a landowner to legally proceed with an activity that would otherwise result in the illegal take of a listed species. The FWS also developed a regulation to address the problem of maintaining regulatory assurances and

providing certainty to landowners through the HCP process, called the “No Surprises” regulation.

What are No Surprises assurances?

No Surprises assurances are provided by the government through the section 10(a)(1)(B) process to non-Federal landowners. Essentially, private landowners are assured that if “unforeseen circumstances” arise, the FWS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permittee. The government will honor these assurances as long as a permittee is implementing the terms and conditions of the HCP permit, and other associated documents in good faith. In effect, this regulation states that the government will honor its commitment as long as the HCP permittees honor theirs.

Are incidental take permits needed for listed plants?

There are no Federal prohibitions under the ESA for the take of listed plants on non-Federal lands, unless taking of those plants is in violation of State law. However, before the FWS issues a permit, the effects of the permit on listed plants must be analyzed because section 7 of the ESA requires that issuance of a HCP permit must not jeopardize any listed species, including plants.

What is the process for getting an incidental take permit?

The applicant is in charge of deciding whether to pursue an incidental take permit. While FWS personnel provide detailed guidance and technical assistance throughout the process, the development of a HCP is driven by the applicant. The applicant is responsible for submitting a completed permit application. The necessary components of a completed permit application are a standard application form, a HCP, an Implementation Agreement (if required), and, if appropriate, a draft National Environmental Policy Act (NEPA) analysis.

While processing the permit application, the FWS will prepare a biological opinion under section 7 of the ESA and the incidental take permit, and finalize the NEPA analysis documents. Consequently, incidental take permits have a number of associated documents besides the HCP.

How long will it take to process our application?

The length of time to complete the permitting process depends on the complexity of issues involved (e.g., the number of species) and the completeness of the documents submitted by the applicant. The FWS will work to complete all steps, such as the public comment process, as expeditiously as possible. The most variable factor in permit processing requirements is the level of analysis required for the proposed HCP under NEPA, in other words, whether an Environmental Impact Statement (EIS), Environmental Assessment (EA), or a categorical exclusion is required. Other factors such as public controversy can also affect permit processing times.

“Low Effect” HCPs are those involving minor effects on federally listed, proposed, or candidate species and their habitats covered under the HCP and minor effects on other environmental values or resources. These HCPs do not require a NEPA document, and the target permit processing time is 3 months.

HCPs that do not fall into the “Low Effect” category require either an EA or an EIS, depending on their complexity. For those requiring an EA as part of the permit application, the target permit processing time is 4 to 6 months. For those requiring an EIS, the target permit processing time may be up to 12 months.

How do we know if we have listed species on our project site?

Check with the appropriate State fish and wildlife agency, the nearest FWS field office, or the National Oceanic and Atmospheric Administration (NOAA) – Fisheries (for anadromous fish). You can arrange for a biologist from one of these agencies to visit your property to determine whether a listed species may be on your project site.

What needs to be in a HCP?

The contents of a HCP are defined in section 10 of the ESA and its implementing regulations. They include:

- an assessment of impacts likely to result from the proposed taking of one or more federally listed species.

- measures the permit applicant will undertake to monitor, minimize, and mitigate for such impacts; the funding that will be made available to implement such measures; and the procedures to deal with unforeseen or extraordinary circumstances.

- alternative actions to the taking that the applicant analyzed, and the reasons why the applicant did not adopt such alternatives.

- additional measures that the FWS may require as necessary or appropriate.

What kind of actions are considered mitigation?

Mitigation measures are actions that reduce or address potential adverse effects of a proposed activity on species covered by a HCP. They should address specific needs of the species involved and be manageable and enforceable. Mitigation measures may take many forms, such as preservation (via acquisition or conservation easement) of existing habitat; enhancement or restoration of degraded or a former habitat; creation of new habitats; establishment of buffer areas around existing habitats; modifications of land use practices, and restrictions on access.

What is the legal commitment of a HCP?

The elements of a HCP are made binding through the incidental take permit. While incidental take permits contain an

expiration date, the mitigation identified in the HCP can be in perpetuity in certain cases. Violation of the terms of an incidental take permit would result in illegal take under section 9 of the ESA. If the violation is deemed technical or inadvertent in nature, the FWS may send the permittee a notice of noncompliance by certified mail or may recommend alternative actions to the permittee so that they may regain compliance with the terms of the permit.

Who approves a HCP?

The FWS Regional Director decides whether to issue a HCP permit based on findings that:

- the taking will be incidental to an otherwise lawful activity;

- the impacts will be minimized, and mitigated to the maximum extent practicable;

- adequate funding will be provided;

- the taking will not appreciably reduce the likelihood of the survival and recovery of the species; and

- any other necessary measures are met.

If the HCP addresses all of these requirements and those of other applicable laws, the permit is issued.

What other laws besides the Endangered Species Act are involved?

In issuing an incidental take permit, the FWS must comply with the NEPA and all other statutory and regulatory requirements, including any State or local environmental/planning laws. HCPs may be categorically excluded from NEPA or may require either an EA or, rarely, an EIS.

Who is responsible for NEPA compliance during the HCP process?

The FWS is responsible for ensuring NEPA compliance during the HCP process. However, if the Service does not have sufficient staff resources to prepare the appropriate NEPA analysis in a timely fashion, an applicant may, within certain limitations, prepare draft Environmental Assessment analyses. This can benefit the applicant and the government by expediting the application process and issuance of the permit. When this is done, the FWS will provide the preparer with appropriate guidance concerning document preparation; and review the document within 30 days and take responsibility ultimately for its scope, adequacy, and content.

Does the public get to comment on our HCP? How do public comments affect our HCP?

The ESA requires a 30-day period for public comment on the application for an incidental take permit. However, we have recognized the concerns of the public regarding inadequate time for the public comment period, and have extended the minimum comment period to 60 days. Additionally, NEPA requires public comment on certain NEPA documents, and the FWS runs these two comment periods concurrently. Therefore, public comments must be considered in the permit decision.

What kind of monitoring is required for a HCP and who performs it?

The ESA or any party we designate as responsible (e.g., State wildlife agency, local government) in the HCP will monitor the project for compliance with the terms of the incidental take permit or HCP. If another party is responsible for monitoring compliance with the permit, the FWS will require periodic reporting from such party in order to maintain overall oversight responsibility for the implementation of the HCP's terms and conditions. For regional and other large-scale or long-term HCPs, monitoring programs must provide long-term assurances that the HCP will be implemented correctly, that actions will be monitored, and that such actions will work as expected. This should include periodic accountings of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements (e.g., habitat acres acquired). Monitoring plans for HCPs should establish target milestones, to the extent practicable, or reporting requirements throughout the life of the HCP and should address actions to be taken in case of unforeseen or extraordinary circumstances.

The FWS must monitor the applicant's implementation of the HCP and the permit terms and conditions. In addition to compliance monitoring, the biological conditions associated with the HCP should be monitored to determine if the species needs are being met. This includes determining if the biological goals that are expected as part of the HCP mitigation and minimization strategy are being met. The effectiveness monitoring will help the FWS determine if the conservation strategy is functioning as intended and the anticipated benefits to the species are being realized.

Are efforts made to accommodate the needs of HCP participants who are not professionally involved in the issues?

Because development of a HCP is done by the applicant, it is considered a private

action and, therefore, not subject to public participation or review until the FWS receives an official application. The FWS is committed to working with HCP applicants and providing technical assistance as required throughout the HCP development process to accommodate their needs. The FWS believes that HCPs under development are restricted by privacy regulations unless waived by the applicant. However, the FWS does encourage the applicant to involve all appropriate parties. This is especially true for complex and controversial projects, and applicants for most large-scale, regional HCP efforts choose to provide extensive opportunities for public involvement during the planning process. The issuance of a permit is, however, a Federal action that is subject to public review and comment. There is time for public review during the period when the FWS reviews the information and decides to grant or deny a permit based on the completed HCP. A 30-day public comment period is required for all completed HCP applications. During this period, any member of the public may review and comment on the HCP and the accompanying NEPA document (if applicable). Additionally, the FWS solicits public involvement and review, as well as requests for additional information during the scoping process for an EIS.

Are the views of independent scientists used or sought, before and during development of a HCP?

The views of independent scientists are important in the development of mitigation and minimization measures in nearly all HCPs. In many cases, these individuals are contacted by the applicant and are directly involved in discussions on the adequacy of possible mitigation and minimization measures. In other cases, the views of independent scientists are incorporated indirectly through their participation in other documents, such as listing documents, recovery plans, and conservation agreements, that are referenced by applicants as they develop their HCP.

How does the FWS ensure that species are adequately covered in HCPs?

The FWS has strengthened the HCP process by incorporating adaptive management into the plans when there are species covered for which additional scientific information may be useful during the implementation of the HCP. These provisions allow FWS and NOAA–Fisheries to work with the landowner to reach mutual agreement upon changes in the mitigation strategies within the HCP area, if new information about the species indicates this is needed. Any changes in

strategy that may occur are discussed up front with the landowner during the development of the HCP. In this manner, the permittees are fully aware of any future uncertainty in the management strategies, and have concurred with the adaptive approaches outlined in the HCP.

What will the FWS do in the event of unforeseen circumstances that may jeopardize the species?

The FWS will use its authority to manage any unforeseen circumstances that may arise to ensure that species are not jeopardized as a result of approved HCPs. The FWS will work with all other Federal and State agencies to help ensure the continued survival and recovery of the species in the wild.

How can I obtain information on numbers and types of HCPs?

Our national HCP database displaying basic statistics on HCPs is available online from our Habitat Conservation Planning page at <http://endangered.fws.gov/hcp/>. The contact information regarding an individual HCP that is available for public comment is listed in the notice of availability for that HCP, published in the *Federal Register* by the appropriate Regional office. Regional office contact information can be found at <http://www.fws.gov>.

**U.S. Fish & Wildlife Service
Endangered Species Program
4401 N. Fairfax Drive, Room 420
Arlington, VA 22203
703/358-2106
<http://endangered.fws.gov/hcp/>
February 2004**